Supreme Court, U.S.
FILED
OCT 15 1999
OFFICE OF THE CLERK

No. 99-486

IN THE

Supreme Court of the United States

RICHARD S. WARING, JOSEPH T. WARING, MELINDA P. WARING,

Petitioners,

v.

UMLIC-NINE CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP VAGLICA
SU-LYN COMBS
VAGLICA & MEINHOLD, L.L.C.
105 East Moreno
Colorado Springs, CO 80903
(719) 634-5724

MAX L. LIEBERMAN
Counsel of Record
MAX L. LIEBERMAN & ASSOCIATES,
A PROFESSIONAL CORPORATION
512 Bethlehem Pike, Second Floor
Fort Washington, PA 19034-2107
(215) 542-9150

Attorneys for Respondent

155593

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit correctly hold that the six-year statute of limitations of 12 U.S.C. § 1821(d)(14) began to run when the Resolution Trust Corporation was appointed receiver of Sunbelt Savings, FSB, on April 9, 1992?

2. Did the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit correctly hold that summary judgment in favor of plaintiff was proper because the appellants' defense of an alleged release agreement failed under 12 U.S.C. § 1823(e) and *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 62 S. Ct. 910, 86 L. Ed. 2d 1224 (1942)?

STATEMENT PURSUANT TO RULE 29.6

UMLIC-NINE Corp. is a wholly owned subsidiary of United Mortgage and Loan Investment Corporation, a North Carolina corporation. There is no publicly held corporation which owns ten percent or more of any corporation which is a party to this action or a parent thereof.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	3
I. This Decision Does Not Conflict With The Decision Of Any Other Court Of Appeals.	3
II. The Warings' Constitutional Rights Were Not Violated.	5
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447, 62 S. Ct. 910, 86 L. Ed. 2d 1224 (1942) ..... i, 6

FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993) 3, 4

RTC v. Cedarminn Building Limited Partnership, 956 F.2d 1446 (8th Cir. 1992) 4, 5

UMLIC-NINE Corporation v. Lipon Springs Development Corporation, 5 F. Supp. 2d 1152 (D. Co. 1998) 2, 3

UMLIC-NINE Corporation v. Lipon Springs Development Corporation, 168 F.3d 1173 (10th Cir. 1999) 3

Statutes:

12 U.S.C. §§ 1821, *et seq.* 1

12 U.S.C. § 1821(d)(2)(A)(ii) 2

12 U.S.C. § 1821(d)(14) ..... i, 2

12 U.S.C. § 1821(e) 4

12 U.S.C. § 1823(e) ..... i, 6

STATEMENT OF THE CASE

Respondent UMLIC-NINE Corp. ("UMLIC") is the current holder of a Promissory Note ("Note") dated June 20, 1986, executed by Richard S. Waring, as President of Lipan Springs Development Corporation ("Lipan Springs"), a Texas Corporation, in the original principal amount of $250,000. The Note was originally payable to the order of Federated Savings and Loan Association ("Federated Savings"). Two deeds of trust were given to secure payment of the Note. One deed of trust encumbered property in the State of Texas. The other, dated June 20, 1986, was executed by Joseph T. Waring, Melinda F. Waring and Richard S. Waring (collectively, the "Warings") and encumbered a condominium unit in Vail, Colorado ("Colorado Deed of Trust"). On June 20, 1987, Lipan Springs entered into a Modification and Extension of Promissory Note and Deed of Trust which extended the maturity date of both the Note and the Colorado Deed of Trust to June 20, 1988.

The Note was not paid on the maturity date, as extended, and thereafter was in default. No payment has ever been made on the Note by Lipan Springs, any guarantor, or any other person.

On August 19, 1988, Federated Savings failed, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as its receiver, and it then assigned Federated's assets to Sunbelt Savings, FSB ("Old Sunbelt"). FSLIC was replaced as receiver by the Resolution Trust Corporation ("RTC") when Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §§ 1821, *et seq*. On or about April 25, 1991, while the four year Texas statute of limitations was still running, Old

Sunbelt, the owner of the loan, failed, and the Office of Thrift Supervision ("OTS") appointed the RTC as its Receiver. The OTS chartered a new institution, Sunbelt Federal Savings, FSB ("New Sunbelt"), and the RTC was appointed as Conservator for New Sunbelt the same day. On April 9, 1992, New Sunbelt was resolved, and the RTC was appointed as its receiver, thereby succeeding to its assets pursuant to 12 U.S.C. § 1821(d)(2)(A)(ii). The Note and Colorado Deed of Trust were assigned by the RTC as Receiver for New Sunbelt to Summatyme Corporation, UMLIC's successor in title, in June, 1995.

UMLIC commenced this action seeking foreclosure of the Colorado Deed of Trust on October 25, 1996. Only the Warings answered, denying liability based upon expiration of the applicable statute of limitations, and an alleged "release agreement". The "release agreement" was not contained in the loan documents nor referred to in any of Lipan Spring's corporate resolutions authorizing the loan. The Warings were not able to produce a copy of that agreement, or any other evidence at all that the agreement ever existed.

Because it was uncontested that the Note was never paid, the district court found that there were no genuine issues of material fact to be determined and that UMLIC was entitled to judgment as a matter of law. In its opinion, the district court analyzed Section 1821(d)(14), the public policy that supported it and the parallelism between it and Section 1821(e), and concluded "that the statute of limitations is reset each time the FDIC or RTC is appointed as receiver or conservator" of a failed financial institution, *UMLIC-NINE Corporation v. Lipon Springs Development Corporation*, 5 F. Supp. 2d 1152, 1158-59 (D. Co. 1998). The court also

held that the contention that the Colorado Deed of Trust was intended to secure only $10,000 was without merit because there was "no evidence to release the defendants or otherwise forgive the indebtedness", *id.* at 1159.

The court of appeals affirmed, but found it unnecessary to reach the question of whether the statute of limitations was reset when the RTC became receiver for New Sunbelt because "the action was timely based on the receivership of Old Sunbelt." *UMLIC-NINE Corporation v. Lipon Springs Development Corporation*, 168 F.3d 1173, 1179 (10th Cir. 1999).

REASONS FOR DENYING THE WRIT

I.

THIS DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

The Warings incorrectly assert that this decision conflicts with a decision of the United States Court of Appeals for the Fifth Circuit, *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993). In *Bledsoe*, the FDIC, as receiver for a failed institution to whom FSLIC had assigned a note and guarantee after the original lender failed, sued on a guaranty, relying on the six year federal statute of limitations because the four year Texas statute had expired. The sole issue in *Bledsoe,* according to the court of appeals, was "whether the six year period of limitations enjoyed by the FSLIC was transferred to Federal Savings upon the assignment of the note by the FSLIC to Federal Savings." 989 F.2d at 809. The court held that "Federal Savings, as the assignee, stood in the shoes of the FSLIC, the assignor, and thus received the FSLIC's six year period of limitations." *Id.* at 810. Only in dictum, in footnote

8, did the court state: "To prevent the possibility of an infinite period of limitations the FDIC cannot receive a new six year period every time it receives a note." *Id.* at 811 n.8. However, as is clear from the accompanying textual discussion, because the FDIC's action was timely with reference to the first receivership, it was not necessary for the court to determine whether the statute began to run again upon the commencement of the second receivership. *Id.* at 811-12.

On the other hand, the decision of the court of appeals is consistent with the dictum found in *RTC v. Cedarminn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992). The issue presented in that case was whether the RTC's right to repudiate burdensome contracts was reinstated when it succeeded itself as conservator or receiver of the same institution. In analyzing the disjunctive structure of 12 U.S.C. § 1821(e), the court stated:

> Throughout FIRREA, Congress specifically articulated when the Corporation was to exercise a duty, right or power in its capacity as a "conservator or receiver."[8] In each instance, it is clear that Congress intended the duty, right or power to be enjoyed or exercised by both the conservator and the receiver. It stretches credibility to assume Congress intended any of rights to be forfeited in instances when the Corporation preceded itself as conservator or receiver of an institution.

956 F.2d at 1451-2 (footnote 8 omitted). In footnote 8, the court catalogued every instance in FIRREA in which the phrase "conservator or receiver" appeared, including ". . . § 1821(d)(14) establishes the statute of limitations for claims brought by the Corporation as 'conservator or receiver' . . . ." 956 F.2d at 1451 n.8. In reaching its conclusion, the court then compared this

structure with all of the instances in which the power, right or duty was limited to the RTC in only one of its capacities. *See id.* at 1452 n.9 and accompanying text.

Because no other circuit has ruled on the precise issue decided by the United States Court of Appeals for the Tenth Circuit, there is no conflict among the circuit courts of appeals.

II.

THE WARINGS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

The Warings appear to argue that because the decision of the court of appeals extended the statute of limitations, their constitutional rights were violated because the alleged "release agreement" may have been lost by UMLIC, its precedessors in title, the RTC, the FDIC, the FSLIC or someone other than themselves.

In the first instance, there is absolutely no evidence in this case that the alleged "release agreement" ever existed, other than the Warings' bald assertions to that effect. Second, there is no evidence that had such document existed, it was lost by UMLIC or some other entity in its chain of title, and third, there is no evidence that had the suit been brought earlier, the document could have been produced. Finally, the Warings never attempted to tender performance under the alleged "release agreement".

In contrast, there was ample evidence that such an agreement never existed. It was not referenced in any of the loan documents, including the Note, deeds of trust, guaranties, corporate resolutions, closing affidavits, and the extension agreement. UMLIC responded to discovery

requests by stating under oath that the document did not exist in any of the files it received from the RTC, and offered to make all of such files available for the Warings' inspection in North Carolina. The Warings declined this opportunity. Furthermore, they did not exert any effort to obtain any of the minutes of the board of directors or of the loan committee of Federated Savings, the original lender, which should have referenced the approval of such an agreement, if it in fact actually existed.

The judicial doctrine expounded in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942) and the legislative provision of 12 U.S.C. § 1823(e) are both designed to protect the assets of failed institutions from secret agreements which would diminish their values. Under either, the party asserting the existence of the agreement has the burden of proving that the agreement existed in writing, that it was executed contemporaneously with the obligation, that its approval by the institution's board or loan committee is reflected in the institution's records, and that it has been continuously maintained as a record of the institution. The Warings failed to establish even one of the necessary elements, and did not advance any evidence that they could have done so at an earlier time.

Accordingly, the Warings' constitutional right to due process of law was not violated by either the district court or the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari in this case should be denied.

Respectfully submitted,

MAX L. LIEBERMAN
Counsel of Record
MAX L. LIEBERMAN & ASSOCIATES,
A PROFESSIONAL CORPORATION
512 Bethlehem Pike, Second Floor
Fort Washington, PA 19034-2107
(215) 542-9150

PHILIP VAGLICA
SU-LYN COMBS
VAGLICA & MEINHOLD, L.L.C.
105 East Moreno
Colorado Springs, CO 80903
(719) 634-5724

Attorneys for Respondent